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In the Supreme Court of the United States
October Term, A. D. 1946.

No. _____

CHARLES P. GOTWALS, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI

To THE HONORABLE THE SUPREME COURT OF THE UNITED
STATES:

Your petitioner, Charles P. Gotwals presents this petition for writ of certiorari and respectfully states to this Honorable Court that this proceeding was begun by the United States of America on the 27th day of April, 1945, by filing in Case No. 49 Civil, Leona Richard Fox, *et al.*, Plaintiffs, *vs.* H. G. House, *et al.*, Defendants, in the District Court of the United States for the Eastern District of Oklahoma, a petition asking for the cancellation of an assignment made by H. G. House to Charles P. Gotwals of money due or to become due said House for his fees and expenses in the cause entitled, In Re: Estate of Jackson Barnett, deceased, No. 4556-Equity, Consolidated, originally filed in the United States District Court for the Eastern District of Oklahoma, and thereafter appealed to the United States Circuit Court of Appeals for the Tenth Circuit, and asking to have the amount due said House in said Case No. 4556-Equity applied as a part payment on the judgment rendered against

said House in said case No. 49-Civil; and by filing a similar petition asking for the same remedy in said case No. 4556-Equity. There is no order consolidating the proceedings under the two numbers, and while they were tried at the same time and only one record carried up, it was given two numbers in the Circuit Court of Appeals, one being 3287 and the other 3288.

The United States claimed a prior right to the money assigned by virtue of the provisions of Section 191 of Title 31 of U. S. Code, which section is as follows:

“Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be satisfied; and the priority established shall extend as well to cases in which the debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.”

The case, or cases, was tried before the Honorable Robert L. WILLIAMS, Circuit Judge, sitting by special assignment and judgment rendered in favor of the petitioner on the 4th day of September, 1945. His findings of fact begin on page 13 of the record and his conclusions of law on page 18 of the record. It was appealed by respondent to the United States Circuit Court of Appeals for the Tenth Circuit and reversed in an opinion filed July 19, 1946. Honorable Orie L. PHILLIPS, United States Circuit Judge, dissented and filed a written dissenting opinion. A petition for rehearing was filed and it was overruled without opinion on the 12th day of August, 1946.

The facts are that H. G. House represented some of the claimants in No. 4556-Equity, In Re: Estate of Jackson Barnett, but at the time of making the assignment to Gotwals did not know what the amount of his fee would be, but knew that he would be entitled to a fee and his actual expenses in the case.

A suit was brought against House and others in the United States District Court for the Eastern District of Oklahoma, which was No. 49-Civil, and entitled Leona Richard Fox, *et al.*, petitioners, *vs.* H. G. House, *et al.*, defendants, in which the United States of America intervened. On the 27th day of October, 1942, after the hearing in said case 49-Civil, but before any decision had been announced and before any judgment had been rendered, House made the assignment to Gotwals. The assignment appears at page 14 of the record filed herewith. Nothing had been done then to subject the fee due House to the claims against him and nothing was ever done until these proceedings were begun two and one-half years later. At that time he and Gotwals had reason to believe that a judgment would be rendered against him and judgment was rendered against him on the 7th day of November, 1942.

The United States District Court for the Eastern District of Oklahoma made an order in case No. 4556-Equity In Re: Estate of Jackson Barnett, fixing the fees and expenses of the attorneys for the different claimants. The decree or order was affirmed by the Circuit Court of Appeals for the Tenth Circuit. By its terms House was entitled to the sum of \$13,582.79 for his fee and expenses. The order of the court with reference to fees and expenses of attorneys included the fees and expenses for all attorneys for all claimants in said case. The assets of the Jackson Barnett estate were in the hands of the Indian Department. The Superintendent for the Five Civilized Tribes paid to the

clerk of the United States District Court for the Eastern District of Oklahoma out of funds in his hands belonging to the estate of Jackson Barnett, deceased, a sufficient amount to pay all the attorneys except the amount due House which had been assigned to Gotwals, and the United States then began this proceeding. No proceeding to reach the money was begun until this proceeding was begun. House never made an assignment for the benefit of creditors. The money was never in the hands of any person charged with the duty of paying it to the creditors of House.

The assignment to Gotwals was made as compensation for his services for House in several important cases and the District Court and Circuit Court of Appeals both decided that the services were well worth the amount assigned.

Your petitioner states that the decision and judgment of the Circuit Court of Appeals is erroneous for the following reasons:

1. The assignment to Gotwals was a valid assignment, made for a valuable and adequate consideration and was sufficient to transfer the title to the money due House and to vest the right thereto in Gotwals.

2. The decision fails to give effect to the provisions of Section 11 of Title 24 of Oklahoma Statutes of 1941, which gives to a person the right in good faith to prefer one or more of his creditors by payment, by mortgage either real or chattel, or by the transfer of personal property or real estate.

3. The decision is in conflict with the case of *Beaston v. Farmers Bank of Delaware*, 12 Peters 102, 9 L. ed. 1017, in which the court construing the statute under which the respondent claims in this case, said:

"From the language employed in this section and the construction given to it from time to time by this

court, these rules are clearly established: first that no lien is created by the statute; second, the priority established can never attach while the debtor continues the owner and in possession of the property, although he may be unable to pay all his debts; third, no evidence can be received of the insolvency until he has been divested of his property in one of the modes stated in the section; and fourth, whenever he is thus divested of his property, the person who becomes vested with the title is thereby made a trustee for the United States, and is bound to pay their debt first out of the proceeds of the debtor's property.",

and is in conflict with the case of *Bramwell v. United States Fidelity & Guaranty Company*, 269 U. S. 483, 70 L. ed. 368, construing the same statute, in which the court said (p. 390 of Official Report) :

"Taken together these sections mean that a debt due the United States is required to be first satisfied when the possession and control of the estate of the insolvent is given to any person charged with the duty of applying it to the payment of the debts of the insolvent, and as the rights and priorities of the creditors may be made to appear.",

and is in conflict with all other decisions construing said Section 191 of Title 31 of U. S. Code.

4. The decision held in effect that the mere custody of the money gave the United States of America a lien, though its custody was for the purpose merely of paying it to House.

And your petitioner states that the grounds of this application are of the nature which under the rules of this Court appeal to its discretion in granting a writ of certiorari.

A copy of the record in the Circuit Court of Appeals is hereto attached marked "Exhibit A" and made a part hereof.

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Wherefore, Your petitioner respectfully prays that a writ of certiorari may issue out of this Court and under its seal, directed to the United States Circuit Court of Appeals for the Tenth Judicial Circuit of the United States at Denver, Colorado, commanding said court to certify and send to this Court on a day to be designated in said writ, a full and complete transcript of the record and proceedings of the said Circuit Court of Appeals in the actions and proceedings entitled United States of America, Appellant, vs. Charles P. Gotwals; Gotwals, Killey and Gibson, a co-partnership, and H. G. House, Appellees, No. 3287, and United States of America, Appellant, vs. Charles P. Gotwals, Gotwals, Killey and Gibson, a co-partnership, and H. G. House, Appellees, No. 3288 on the docket of said court, to the end that said cause may be reviewed and determined by this Court, and further prays that the decision, judgment and decree of said Circuit Court of Appeals be reversed and set aside by this Honorable Court, and that judgment be rendered in this Court to the effect that said assignment was valid and that your petitioner is entitled to receive the money assigned to him by said House, and your petitioner further prays for such other and further relief and remedy as to this Court shall seem just.

CHARLES P. GOTWALS,
Petitioner,

By MALCOLM E. ROSSER,
His Attorney.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

It does not seem necessary to write a brief in support of the petition for writ of certiorari. The petition itself and the findings and conclusions of the Judge who tried the case in the District Court and the dissenting opinion in the Circuit Court of Appeals contain about everything that can be said. But the writer wants to say a few words more.

The statute upon which the Government relies for recovery in this case has been in effect since the very beginning of the Government. In *United States v. Oklahoma*, 261 U. S. 253-259, 67 L. ed. 638-643, Mr. Justice BUTLER gives a short history of the act. He says that it has been considered by numerous cases in the Supreme Court and further says: "No lien is created by it. It does not overreach or supersede any bona fide transfer of property in the ordinary course of business."

The statute was first construed by Chief Justice MARSHALL in *United States v. Fisher*, 2 Cranch, 358, 2 L. ed. 304, and several later cases. In *Thelusson v. Smith*, 2 Wheat. 396, 4 L. ed. 271, Justice Bushrod WASHINGTON followed the earlier cases and held that a mere state of insolvency gave the United States no preference unless there was a voluntary assignment. The decisions of these men so famous in the history of our jurisprudence should not be set aside now after they have been followed for more than one hundred and forty years. No case has been found holding that the United States is entitled to priority unless the debtor's property was in the hands of some one charged with the duty of applying the proceeds on the debts of the owner of the property.

The facts in *United States v. Hooe*, 3 Cranch, 73, 2 L. ed. 370, bear some resemblance to the facts of this case and the construction contended for here was given the statute.

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The law of Oklahoma as well as the common law gives a debtor the right to prefer his creditors. (*Reidell v. Lydick*, 176 Okl. 204.)

An assignment such as was made in this case is valid even though the assignee knew that the result would be that other creditors would not be paid. (See *Van Iderstine v. National Biscuit Company*, 227 U. S. 572-582, 57 L. ed. 652-654; *Adams v. Champion*, 294 U. S. 231, 79 L. ed. 880-882.)

The decision of the Circuit Court of Appeals is not supported by any authority that the writer is able to find and it is in good faith believed that a writ of certiorari should be granted.

Respectfully submitted,

MALCOLM E. ROSSER,
Attorney for Petitioner.